

RINI, CORAN & LANCELLOTTA, P.C.

Attorneys at Law

Dupont Circle Building  
1350 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036-1701

(202)296-2007

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DOCKET FILE COPY ORIGINAL

Facsimile  
(202) 429-0551

Internet  
rclpc@rclpc.com

Web Site  
<http://www.rclpc.com>

ROBERT J. RINI  
STEPHEN E. CORAN  
STEVEN A. LANCELLOTTA  
T. MICHAEL JANKOWSKI  
DAVID G. O'NEIL  
EVAN D. CARB  
SARAH H. EFIRD  
E. LAWRENCE ZOLT  
R. BRADLEY KOERNER  
JOAN E. MASTERS

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JAN 26 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

*Via Hand Delivery*

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Re: MM Docket No. 97-234  
GC Docket No. 92-52  
GEN Docket No. 90-264  
Implementation of Section 309(j)  
of the Communications Act

Dear Ms. Salas:

NDEE NITCHI'I BINAGODI'E d/b/a Apache Radio Broadcasting Corporation, by its attorneys, hereby files an original and four copies of its comments in the above-referenced proceeding. Please direct any comments regarding the enclosed to undersigned.

Respectfully submitted,



David G. O'Neil

DGO:do  
Enclosures (5)

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	MM Docket No. 97-234
of the Communications Act	)	
– Competitive Bidding for Commercial	)	
Broadcast and Instructional Television Fixed	)	
Service Licenses	)	
	)	
Reexamination of the Policy Statement on	)	GC Docket No. 92-52
Comparative Broadcast Hearings	)	
	)	
Proposals to Reform the Commission’s	)	GEN Docket No. 90-264
Comparative Hearing Process to	)	
Expedite the Resolution of Cases	)	

**COMMENTS OF NDEE NITCHI’I BINAGODI’È D/B/A  
APACHE RADIO BROADCASTING CORPORATION**

NDEE NITCHI’I BINAGODI’È d/b/a Apache Radio Broadcasting Corporation (“Apache Radio”), by its attorneys and pursuant to Section 1.415 of the Commission’s Rules, hereby submits the following comments in response to the *Notice of Proposed Rule Making* for the above-captioned proceeding (the “*NPRM*”).<sup>1</sup> The *NPRM* seeks comments on a number of auction-related issues, including the procedures for competitive bidding. Apache Radio strongly believes that applicants affiliated with Indian Tribes qualify as a designated entity for the competitive bidding process under federal law and Commission precedent either as a small business or because of the unique relationship between Indian Tribes and the United States. Apache Radio believes that it is in the public interest to award designated entities tax certificates, bidding credits, installment payments or a similar benefit. Apache Radio recommends that the competitive bidding process require only a

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<sup>1</sup> The deadline for filing comments on the *NPRM* is January 26, 1998. *See Errata* (released December 11, 1997). Thus, these comments are timely filed.

minimum upfront payment to be determined based upon the proposed population to be served and that the upfront payment satisfy the requirements for the minimum bid. Finally, the Commission should conduct the competitive bidding process through multiple bidding rounds and not reopen closed filing windows to new applicants.

### **Introduction**

1. The White Mountain Apache Tribe of the Fort Apache Indian Reservation (the “White Mountain Apache Tribe”) is the legal name of a tribe of the Apache people residing on the Fort Apache Indian Reservation. The reservation is located in eastern Arizona and covers 1.6 million acres (1,400 square miles) with a population of 13,000, 99% of whom are American Indian. An additional 10,000 members of the San Carlos Apache Tribe live on the San Carlos Indian Reservation. That reservation is located directly south of the Fort Apache Indian Reservation. It is difficult to provide news and information to residents on these two reservations because the reservations are rural in nature, consisting of small, isolated communities located in mountainous terrain and canyons.

2. The White Mountain Apache Tribe formed Apache Radio in 1980 as a nonprofit corporation to establish, maintain and operate public broadcasting stations in order to preserve and disseminate the Apache language, culture and teachings throughout the tribe’s reservation and adjoining ancestral lands. Since 1982, Apache Radio has operated FM Radio Broadcasting Station KNNB, 88.1 MHz, Whiteriver, Arizona to provide educational and information programming to the Apache people. KNNB broadcasts the majority of its programming in Apache. The station serves as the sole source of information and news to some Apache people who are not fluent in any other language and helps to preserve and pass on the Apache language, culture and teachings. KNNB’s

archives includes Apache music, crown dancers, religious events and interviews with Apache people reflecting on Apache life, history and culture.

3. KNNB currently broadcasts with 630 watts Effective Radiated Power (“ERP”). Because the coverage contour of KNNB is so limited, Apache Radio is unable to provide service to the entire White Mountain Apache Tribe Indian Reservation and provides no service to the San Carlos Indian Reservation. On November 8, 1995, Apache Radio filed an application for a new FM Radio Station for Channel 294C1 at Pinetop, Arizona (File No. BPH-951108MB). The proposed facilities will operate with 100 kW ERP and serve both reservations. Apache Radio’s application is mutually exclusive with another applicant.

### **Discussion**

#### **I. Designated Entities**

4. Apache Radio supports treatment of small businesses as a designated entity and implementation of bidding credits, reduced upfront payments/down payments, installment payments and tax certificates in order to ensure participation by small businesses. Apache Radio further supports, for purposes of determining what constitutes a small business, that applicants affiliated with Indian Tribes and nonprofit organizations qualify as a small business.

5. Treatment of applicants affiliated with an Indian Tribe as a small business is consistent with Commission precedent.<sup>2</sup> In adopting competitive bidding rules for auction of the “C Block”

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<sup>2</sup> See *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Sixth Report and Order*, 11 FCC Rcd 136, 156 (1995) (“*Sixth Report and Order*”); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Order on Reconsideration*, 9 FCC Rcd 4493, 4494 (1994) (“*Reconsideration Order*”); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order*, 10 FCC Rcd 403, 427 (1994) (“*Fifth Report and Order*”).

for Personal Communications Services, the Commission exempted Indian Tribes from the affiliation rules in determining what constitutes a “small business” because of the unique legal constraints on the way Indian Tribes can utilize their revenues and assets.<sup>3</sup> Similarly, the Small Business Administration is required to determine the size of a business concern owned by a tribe without regard to the concern’s affiliation with the Indian Tribe.<sup>4</sup> Accordingly, the Commission should treat applicants affiliated with Indian Tribes as a small business.

6. Similarly, the Commission should treat nonprofit organizations as a small business. Nonprofit organizations are restricted in their ability to raise funds, relying upon grants or contributions from the public or members. In most instances a nonprofit organization does not have stock to pledge nor may it issue new stock or debt securities.

7. The Commission should treat the Indian Tribes as a designated entity because of their unique political status and pursuant to the federal government’s trust obligation to uphold tribal sovereignty, health and economic welfare. The federal government treats Indian Tribes as unique aggregations and thereby provided special access because of their status as economically disadvantaged.<sup>5</sup> Indian Tribes also enjoy unique status under the Constitution.<sup>6</sup> Consideration of

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<sup>3</sup> *Fifth Report and Order* at 427. Native American corporations are precluded from raising capital either through a pledge of the stock of the company against ordinary borrowing or issuing new stock or debt securities. *Sixth Report and Order* at 156, *Fifth Report and Order* at 427-28. Nor may land holdings be used as collateral for purposes of raising capital, because the land holdings are owned in trust by the federal government or are subject to a restraint on alienation in the government's favor. *Fifth Report and Order* at 428.

<sup>4</sup> 15 C.F.R. § 121.401(d).

<sup>5</sup> See, e.g., Indian Financing Act, 25 U.S.C. § 1451 *et seq.*; Buy Indian Act, 25 U.S.C. § 47 *et seq.*; 25 U.S.C. §§ 13, 109, 218 and 404 (U.S. Bureau of Indian Affairs grants and loan programs).

<sup>6</sup> U.S. Const. art I, § 8, cl. 3.

Indian Tribes as a designated entity is based not upon racial preference but upon the federal government's unique trust relationship with Indian Tribes.<sup>7</sup>

8. The Commission must treat small businesses as a designated entity for the competitive bidding process for closed and future filing windows. The consolidation in the broadcast industry within the past several years, combined with elimination of the comparative hearing criteria, will encourage larger broadcasters to file applications for future auctions. Small businesses will be unable to compete with these well funded larger applicants. With respect to auctions involving closed filing windows, most applicants will not have budgeted for the expenses associated with an auction. Instead, the applicants will have budgeted for normal business expenses, such as constructing and operating their new facilities for three months without generating revenue. Most small businesses will have insufficient funds remaining after the auction process to construct and operate the facility. Thus, without treatment of a small business as a designated entity, many applicants may be forced to withdraw from or not participate in the competitive bidding process.

9. Apache Radio believes that designated entities should be able to select from among bidding credits, reduced upfront payments/down payments, installment payments or tax certificates. The designated entity is in the best position to determine which option is most beneficial to the entity for the competitive bidding process. For example, tax certificates are of little or no value for nonprofit organizations. An entity may prefer a reduced upfront payment instead of installment payments or vice versa. The public interest is best served by letting the designated entity determine which option it prefers, thereby ensuring maximum participation in the competitive bidding process.

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<sup>7</sup> See, e.g., *Memorandum Dated April 29, 1994 from President William J. Clinton* (recognizing unique relationship between Indian Tribes and United States and outlining principles for interaction between the Executive Branch and Native Americans).

## **II. Competitive Bidding Procedures**

10. Apache Radio believes the Commission should require a minimum upfront payment for competitive bidding for broadcast facilities. Adoption of a minimum upfront payment will serve the public interest by ensuring that the spectrum is awarded to the person who will use it in the most efficient manner. The payment will expedite the competitive bidding process by eliminating those applicants who are not genuinely interested in the spectrum but instead have filed their applications for speculative purposes. However, the payment should not be so high as to preclude legitimate applicants from participating in the competitive bidding.

11. Apache Radio believes the minimum upfront payment should be determined based upon the population the applicant proposes to serve. The principal factor in determining whether to file an application for a new broadcast facility is the proposed population located within the proposed facility's principal community contour. The larger the population within the proposed service area, the greater the value of the spectrum. The Commission should determine the minimum upfront payment based on some mathematical formula such as the population in the proposed service area multiplied by a set value per person. The value of the minimum upfront payment will vary from market to market, with a higher value in densely populated urban areas and a lower value in sparsely populated rural areas. In this manner, the payment will reflect the actual value of the spectrum.

12. Determining the minimum upfront payment based upon the market size, market rating, advertising rates or broadcast transactions would create an inflated payment that bears no correlation to the actual value of the spectrum. Each criteria incorrectly presumes that spectrum is fungible instead of unique like real property. Moreover, the criteria is more appropriate for valuation of mature spectrum as opposed to auctioning fallow spectrum.

13. For example, the value of a broadcast transaction is based upon a number of criteria, including a multiple of the cash flow, the assets, frequency, power, coverage area, concentration of ownership, number of stations involved in the transaction, and intangibles such as reputation and good will in the community. Most importantly, the valuation is based upon an operating station as proposed to a prospective station.<sup>8</sup> Similarly, market size and rating are of no assistance if the broadcast station does not place a usable signal over the entire market or if the area is not ranked. For example, a station that is located outside of a large metropolitan market but whose contour overlaps tangentially a portion of the market can not be said to be serving that market.<sup>9</sup> Finally, advertising rates are based upon present performance of a station and not prospective performance. Advertising rates are determined upon a number of factors, including ratings, demographics, format and concentration of ownership. Each station's advertising rate is unique. An applicant can not accurately determine its prospective broadcasting rates.<sup>10</sup> Consequently, none of these proposals provide the necessary objective criteria for valuation of a spectrum. To the contrary, to the extent

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<sup>8</sup> For example, subtracting the assets from the value of a sale will not provide an accurate portrayal of the value of the spectrum. As discussed above, the station value is based upon a number of factors. Moreover, personal assets are often amortized and worth relatively little by the time of the sale. A new applicant, on the other hand, must purchase transmission equipment, main studio, etc. at the fair market value.

<sup>9</sup> See, e.g., *Chattahoochee, Florida*, 10 FCC Rcd 10352, 10354 (Chief, Allocations Branch) (1995) (applicant not required to make showing that proposed community is separate from larger urban area if proposed signal will not cover 50% or more of the urban area). Even if the proposed signal does cover 50% or more of the urban area, the Commission has established standards for determining whether the community is separate from the urban area. *Id.* at 10355.

<sup>10</sup> It is more likely that a new station initially will undercharge for the spectrum in an effort to attract advertisers. Consequently, determination of prospective advertising rates either could result in undervaluation of the spectrum if based upon the perspective of a new station or overvaluation if based upon the perspective of an existing station.



that the criteria would exaggerate the value of the spectrum and thereby increase the minimum upfront payment, the criteria could deter legitimate applicants from bidding on the spectrum or force the winning bidder into bankruptcy.

14. The competitive bidding process should consist of multiple rounds until the successful bidder remains. Multiple bidding ensures the most efficient use of the spectrum because the successful bidder will be motivated to serve the public or risking losing his investment. Single round bidding or silent auctions does not serve the public interest because the successful bidder may be forced either to bid too much for the spectrum or be unable to increase his bid if it was too low. The former could lead to the spectrum remaining fallow or inefficient use of the spectrum. The latter could result in the spectrum being used by someone who will not use it in the most efficient manner.

15. The minimum bid for each round should be increased by 10% from the previous round's highest bid in order to be considered acceptable. If no such bid is made, then the highest bidder in the previous round shall be considered the winner. In this manner the competitive bidding process will be expedited by reducing the number of bidding rounds while simultaneously not deterring applicants from participating. Apache Radio believes that the bidding should be conducted either electronically or telephonically at the sole discretion of the applicant. It is the experience of Apache Radio that the electronic process, although more accurate and efficient, can suffer from power outages, disconnections, interruptions or failure to make connections, any of which could eliminate an applicant from the bidding process. It is therefore in the public interest to permit applicants to have the option of submitting bids either electronically or telephonically.

16. Apache Radio believes that the public interest would not be served by reopening the filing windows to accept additional applicants for the competitive bidding. The Commission

established filing windows for the purpose of orderly processing of mutually exclusive applications. Reopening filing windows would not expedite the processing of these applications, many of which were filed several years ago. Instead, reopening the filing windows would extend the competitive bidding process and Commission resources to accommodate new applicants. This is contrary to the goal of the competitive bidding process to resolve mutually exclusive applications in an expedited manner.

17. Reopening the filing window is also unfair to the applicants who filed during the filing window. The applicants have expended considerable resources to prepare their applications. New applicants would not have to expend these resources, but instead file a short-form application. Moreover, the pending applicants have waited many years for the Commission to consider their applications. It is patently unfair to punish their timely filings and patient waiting for the Commission to process the applications, by permitting other applicants to file applications at this late a stage. The prospective applicants could have filed during the original filing window but elected to forego that option. They are not entitled to a second opportunity now.

### **Conclusion**

The Commission should treat applicants affiliated with Indian Tribes qualify as a designated entity for the competitive bidding process either because of the unique relationship between Indian Tribes and the United States or because the applicant qualifies as a small business. The Commission should treat nonprofit organizations as small business. A designated entity should have the discretion to select whether it wishes to receive bidding credits, tax certificates or make reduce upfront payment or installment payments.

Implementation of minimum upfront payments, multiple bidding rounds and incremental increases in each bidding round as suggested herein will ensure that the applicant placing the greatest value on the spectrum will be the successful bidder while at the same time avoiding overpayment for the spectrum that could lead to the spectrum remaining unused. The public interest is not served by reopening the filing windows for additional applicants. This will only delay awarding spectrum and will favor new applicants over the pending applicants.

The purpose of the competitive bidding process is twofold: (1) place valuable spectrum in the possession of the applicant who values it the most, thereby ensuring maximize use of the spectrum to best serve the public; and (2) resolve mutual exclusivity in an expeditious and efficient manner. The Commission should adopt procedures for its competitive bidding process consistent with these two criteria. Apache Radio believes that its proposals would further these objectives.

WHEREFORE, for the foregoing reasons, Apache Radio respectfully submits its comments.

Respectfully submitted,

**NDEE NITCHI'I BINAGODI'E D/B/A APACHE  
RADIO BROADCASTING CORPORATION**

By:   
David G. O'Neil

RINI, CORAN & LANCELOTTA, P.C.  
1350 Connecticut Avenue, NW  
Suite 900  
Washington, DC 20036  
(202) 296-2007

January 26, 1998

Its Attorney